

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. E004 OF 2025

NEW PALEAH WHOLESSELLERS LIMITED..... APPELLANT

VERSUS

CHARLES OPIYO T/A MWANANCHI

GENERAL

HARDWARE.....

RESPONDENT

(An appeal from the judgment and decree of Hon. C. Maiyo (RM) delivered on 10th December 2024 in Siaya Small Claims Court Case No. No. E170 of 2024)

BETWEEN

NEW PALEAH WHOLESSELLORS LIMITED..... CLAIMANT

VERSUS

CHARLES OPIYO T/A MWANANCHI GENERAL

HARDWARE..... RESPONDENT

JUDGMENT

1. Vide a statement of claim dated 10th September 2024, the claimant sought for a sum of Ksh 113,780/=, costs and interest arising from supply of cement that the Claimant made upon request by the Respondent. The Respondent is alleged to have failed to fully pay for the said supply hence the claim.
2. After a full trial, the learned trial adjudicator dismissed the claim for lack of adequate evidence.
3. Aggrieved by the said decision, the Appellant filed its Memorandum of Appeal dated 16th December 2024 wherein he raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and fact by finding that there was no evidence of the agreement between the parties despite the Respondent admitting in his evidence having been engaged with the Appellant in purchasing goods from them.

- ii. That the trial magistrate erred in law and fact in failing to properly evaluate the Appellant's submissions and the evidence therein, thereby reaching an erroneous conclusion that the Appellant failed to prove its case against the Respondent on a balance of probability.
- iii. That the trial magistrate erred in law and fact in holding that the Appellant did not produce as evidence the subject agreement between the parties despite the Respondent acknowledging the stamp of the Appellant's exhibit 3 as his and confirming receiving the said invoice from the Appellant.
- iv. That the trial magistrate erred in law and fact in failing to appreciate that the claim did not arise from a single supply of goods but a number of supplies which the Respondent failed to fully settle.
- v. That the trial magistrate erred in law and fact by ignoring the fact that the Respondent relied on the same statement of accounts and the invoice as filed by the Appellant thereby confirming the existence of a business relationship between the parties.

The Appellant therefore prayed that the appeal be allowed, and the judgment/decree of Hon. Christabel Maiyo dated 10th December 2024, in Siaya SCCOMM NO. E170 of 2024 be set aside and substituted with a judgment allowing the Appellant's appeal with costs.

4. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).**
5. **Douglas Kuria Njiru (CW1)** adopted his witness statement dated 10/9/2024 as evidence in chief. In his statement, he testified that he is the Claimant's director, and that the claimant is engaged in the business of supply of cement. That on or about 1st July 2020 the Respondent entered into an agreement with the Appellant for the supply of cement, where the Appellant was to supply cement to the Respondent. It was his testimony that the Respondent confirmed receipt of the cement as ordered for a quoted sum of Kenya shillings one hundred and thirteen thousand seven hundred and eighty, exclusive of transport

charges which agreement was binding. That the number of transactions over the period of 2020 being three, selling three products being iron sheets, different cement products. That the outstanding amount to be paid was Ksh 113,780/=. He produced the list of documents dated 10/9/2024 as claimant's exhibit 1-5.

On cross examination, he stated that he is the CEO of the claimant with authority of the company and that he is not aware if a resolution of the company was filed. That he has not filed any agreement or filed any delivery note nor any invoice evidencing such transaction.

On re-examination, he stated that he is the director of the company doubling up as the CEO of the Claimant and had instructions to act on behalf of the company. That the agreement between the parties was oral via phone calls. That the Respondent ordered for 600 bags of cement at Ksh 390,000/= and that he paid 108,600/= and placed two more track load of 600 bags delivered on 9/7/2020 each worth Ksh 348,000/= and that the Respondent further ordered for a truck of cement and iron sheets which the claimant delivered on 13/7/2020 worth 670,630/=. That the Respondent deposited Ksh 963,800/= for the order of two tracks of cement and iron sheets and since that day he did not make any further order. That the payment difference was Ksh 473,880/=. That he was

not present during execution of the agreement but had a representative.

That marked the close of the Appellant's case.

6. **Charles Opiyo Ngesa (RW1)** adopted his witness statement dated 6/11/2024 as his evidence in chief. His list of documents dated 6/11/2024 was produced as exhibit R Exhibit 1-2. He testified that he used to buy goods from the claimant but as far as he is concerned, he paid all the money owing to the claimant and that there is no debt. Further, that he was not served with a demand letter prior to filing the suit. Referring to Claimants exhibit 4, he stated that he has never seen it before and that the stamp is not his and that he has not entered into any sort of agreement and has never been supplied with cement worth 113,780/= and that he doesn't owe the claimant any money.

On cross-examination, he stated inter alia; that he has been doing business with the claimant but that he has been supplying goods upon payment and not ordering goods in advance; that he used to pay for the goods and that the commitment letter is not his as he did not sign it and that the stamp is not his; that in Claimant's exhibit 1, he confirms the stamp to be his; that he ordered and received the goods; but was not aware that the cheque bounced; that between 24/8/2020 and 21/2/2022 there were no products supplied to

him; that the last payment was on 21/2/2022 and that he did not have any debt with the Claimant.

On re-examination, he stated that the credit of Ksh 396,000/= was given to him because he had returned substandard goods; that he continued to send money as he used to order items while in the account.

That marked the close of the Respondent case.

7. The appeal was canvassed by way of written submissions. Both parties complied.
8. The Appellant, vide submission dated 18/9/2025, submitted that the trial magistrate erred in holding that the Appellant failed to prove its claim on a balance of probabilities as there was no agreement to support the same. The Appellant submitted that the Respondent admitted the debt via claimant's exhibit 4 (commitment letter dated 9/10/2020). It was further submitted that there was an oral contract supported by invoices and account statements and that the claim was enforceable. Reliance was placed in two cases namely **Mwangi t/a Stemer Hardware & Paints v Apex Steel Limited (Civil Appeal 367 of 2018) [2014] KEHC 7047 (KLR) (Civ) (13 June 2024) (Judgment)** where the court stated as follows:

“ On its part, the Respondent armed the existence of a contractual relationship between the parties

between the years 2003 and 2009. From a re-examination of the record, the court observed that while the Appellate appeared to contest the existence of a contract between the parties by his pleadings before the trial court and submissions on appeal, he admitted in his oral testimony to the existence of a contract for supply of goods between the parties at the material times which gives credence to the evidence tendered on behalf of the Respondent. More specifically, the Appellant admitted to placing orders with the Respondent for the supply of goods by way of complementary notes, and to making payments thereon. He also admitted collection of such ordered goods by himself or through his representative, one Eric Mwangi.

Further, the court in **Mwangi T/a Stemer Hardware & Paints (supra)** quoted with approval the case of **Devcon Group Limited v Timsales Limited [201G] eKLR** stated that:

“In this case we find that the Respondent’s contention that there was an oral agreement between the parties to deliver timber products to the Appellant is corroborated by the delivery notes and invoices produced in court. we concur

with the following sentiments of the trial court, “to conclude this point, the evidence adduced by the Plaintiff (Respondent) clearly demonstrated that there was a contract between the Plaintiff and the Defendant. The contract was partly oral and partly written. There were orders to buy products from the Plaintiff by the Defendant through purchase orders, made to the Plaintiff in writing. There was an acceptance of that order through the delivery of the products to the Defendant or through collection by the Defendant, which was acknowledged in writing by the signing of the delivery notes. There was consideration which the Plaintiff claimed from the Defendant through invoices.”

It was further submitted that the Appellant complied with provisions of Section 107 and 109 of the Evidence Act as it proved its case on a balance of probabilities as it produced documentary evidence which was not controverted by the Respondent. It was also submitted that the Respondent admitted that the stamp on Exhibit 3 was his and further confirmed receipt of the invoices hence the trial court should have ruled in favour of the Appellant. It was also submitted that the trial court should have noted that the Law of Contract recognizes both oral and partly oral/written agreements. That the Appellant presented evidence to show that there were

multiple transactions between the parties which took place over a long period of time and that the commitment letter dated 9/10/2020 confirmed the existence of an oral agreement for the supply of cement. It was finally submitted that the documents the Appellant relied upon were the same ones that the Respondent also relied on. The Appellant therefore urged the court to allow the appeal as prayed.

9. The Respondent filed submissions dated 6/10/2025. Learned counsel gave a brief history of the matter which was inter alia; that the Claimant's suit in the trial court was that on or about 1st July 2020 it entered into an agreement with the Respondent for the supply of cement; that pursuant to the agreement, the Respondent acknowledged receipt of and confirmed it received the cement as ordered for a quoted sum of Kshs. 113,780/=; that the Claimant thus claimed payment of Kshs.113,780 for goods (cement) allegedly supplied to the Respondent on or about 1st July 2020. The Respondent denied the claim and stated that whereas he used to buy cement from the Claimant, they did not enter into any supply agreement as alleged. That he paid for all the purchases he made from the Claimant and that he does not owe the Claimant any debt. Upon considering pleadings, evidence and submissions by the parties, the court dismissed the Claimant's case. The court held that the Claimant failed to prove its case on a balance of probabilities for failing to

produce agreement for supply of cement and proof of delivery of cement valued at Kshs.113, 780.

10. Based on the grounds of appeal vide amended memorandum of appeal dated 1st July 2025, the Respondent has identified 6 issues for determination, namely:

- a. Whether the trial court erred in law in finding that there the Appellant failed to produce evidence of agreement in support of its claim
- b. Whether the trial court erred in law in finding that the Appellant failed to prove its case on a balance of probabilities
- c. Whether the trial court erred in law in holding that the Appellant failed to adduce as proof the subject agreement between the parties
- d. Whether the trial court erred in law by failing to appreciate that the claim did not arise from a single supply of goods but several supplies
- e. Whether the trial court erred in law by failing to appreciate that under law of contract, agreements may be oral or partly oral and partly written
- f. Whether the trial court erred in law by ignoring the fact the Respondent also filed and relied on the same Statement of account and the invoice as filed by the Appellant thereby confirming the existence of a business relationship between the parties.

11. On the issue of whether the trial court erred in law in finding that the Appellant failed to produce evidence of agreement in support of its claim, the Respondent submits that the Honourable trial magistrate was right to find that there was no evidence of agreement between parties regarding the amount claimed even though it was not in dispute whether the parties had had a business relationship. That the court considered that both parties admitted having a business relationship and that the Respondent agreed that the Claimant would supply him with cement and other goods and he would pay for them. The trial court also considered the Respondent's defense and testimony that he never entered into any agreement for supply of cement or that he owed the Claimant Kshs.113,780 for supplied cement. That the trial court then noted that no agreement was produced showing contract for delivery of cement valued at Kshs.113,780. That the court noted that the Claimant only produced a statement of account and commitment letter which were produced as C-Exhibit 2 and C-Exhibit 3 respectively per document Nos. 3 and 4 in claimant's list of documents at page 12 of the Record of Appeal. The court noted that the Respondent refuted ever signing the commitment letter and the Claimant never called any witness who oversaw execution of the letter. It was then held that a mere production of statement of account was not sufficient to enlighten court on debts due and owing for goods supplied in the absence of the agreement and

or delivery note showing supply. That the court found that the Claimant fell short of the burden placed on it by Section 107 of the Evidence Act which requires that whoever alleges must prove.

12. It was submitted that the Appellant's claim as per its own pleadings is not lost to this Honourable Court as the Respondent draws the courts attention to paragraph 3 of the claimant's statement of claim at page 5 of Record of Appeal where the Appellant pleaded the nature of claim to be **"Goods sold and delivered on or about the 1st day of July 2020 to the value of Kshs 113,780"**. Moving to **paragraph 4(4)** the Appellant pleaded that **"On or about the 1st July 2020, the respondent herein entered into an agreement with the claimant for the supply of cement under which the claimant was to supply cement to the respondent"**. Finally, at **paragraphs 4(5) and 4(6)** it was pleaded that **"The respondent acknowledged receipt of and confirmed it received the cement as ordered for a quoted sum of Kshs.113,780/=..."** and **"Despite the Claimant's numerous remainders to the Respondent to pay for the goods delivered in the sum of Kshs. 113,780/=,"** respectively. That the above pleadings are replicated in the Appellant's adopted witness' statement at page 10 of the record of appeal.

13. Further, it was submitted that from its own pleadings, 2 things arose; one, that its claim concerned goods sold and delivered on 1st July 2020 to the value of Kshs.113,780 and, two, that there was an agreement entered into on 1st July 2020 for the supply of cement amounting to Kshs.113,780 which the Respondent received.
14. That indeed, the Respondent's witness neither produced the agreement dated 1st July 2020 for the supply of cement worth Kshs.113,780 nor delivery note or invoice for cement delivered worth Kshs.113,780 and that what was produced was the cash statement (C-Exhibit 2) which does not include any invoice dated 1st July 2020 for Kshs.113,780 and handwritten commitment letter dated 9th October 2020 (C-Exhibit 3) for Kshs.243,780 which was denied by the Respondent and is completely unrelated to the pleaded claim of cement delivered on 1st July 2020 worth Kshs.113,780. During cross-examination, the witness admitted that he did not file the agreement and delivery note or invoice for the supply worth Kshs.113,780 pleaded. He also admitted that he was not present when the commitment letter was signed.
15. Further, it was submitted that the Appellant's witness argued at trial that the Kshs.113,780 was a balance as per the last entry dated 21st February 2022, the same was never pleaded. What was pleaded was not 'a balance' but a specific supply made on 1st July 2020 amounting to Kshs.113,780 pursuant to

an agreement entered into on the same date and that no record specific to 1st July 2020 was produced.

16. Further, the Respondent explained the issue of alleged balance of Kshs.113,780 captured in C-Exhibit 2 during trial that the same is as a result of double entry whereby the Claimant gave the Respondent a credit note for Kshs.396,000 on 28th July 2020 on account of goods that were delivered in bad condition which the Claimant got back but went ahead to re-enter the Kshs.396,000 in the cash statement. The Respondent explained that due to that double entry he overpaid the Claimant by Kshs.282,220 thus it is the Claimant who owes and not him owing the Claimant. In this case, the Appellant's pleadings, are that it supplied cement worth Kshs.113,780 on 1st July 2020 pursuant to an agreement on 1st July 2020 to supply cement for Kshs.113,780; and not that he supplied goods worth much more and the Respondent paid partly while remaining with a balance of Kshs.113,780. The agreement was never produced and the delivery note or invoice for cement worth Kshs.113,780 as pleaded was never produced.
17. As to whether the trial court erred in law in finding that the Appellant failed to prove its case on a balance of probabilities, it was submitted that the the Appellant's claim as already submitted hereinabove was specific to an agreement whereby it alleged that it entered into an agreement with the Respondent

on 1st July 2020 for supply of cement worth Kshs.113,780 and that on 1st July 2020 it supplied the cement worth Kshs.113,780 to the Respondent who failed to pay up. The agreement was not produced and a delivery note was never produced. Even from the cash statement (C-Exhibit 2), the first entry is an invoice dated 8th July 2020 for goods worth Kshs.390,000. No supply was made on 1st July 2020 for Kshs.113,780 which explains why there was no delivery note or invoice for 1st July 2020. The Respondent therefore submits that indeed, the Appellant failed to prove its case on a balance of probabilities as was held by the trial magistrate.

18. On Whether the trial court erred in law in holding that the Appellant failed to adduce as proof the subject agreement between the parties, the Appellant lamented that Honourable court erred in law in holding that the Appellant did not adduce as proof the subject agreement between the parties despite the Respondent acknowledging the stamp on Appellant's exhibit 3 as his and confirming receiving of the said invoice from the Appellant. Further, the Respondent emphasizes that the specific agreement that needed to be produced but was not produced was the agreement entered into on 1st July 2020 for the supply of cement worth Kshs.113,780 as was pleaded. This is what the trial magistrate meant and that C-Exhibit 3 was never about cement allegedly supplied on 1st July 2020 worth Kshs.113,780.

19. As for whether the Respondent acknowledged stamp on C-Exhibit 3 (the handwritten commitment letter), Respondent's counsel drew the court's attention to the proceedings where at examination-in-chief the Respondent categorically stated that he had never seen the commitment letter before and stated that the stamp on it was not his. During cross-examination, he maintained that he never signed the commitment letter (C-Exhibit 3) and that the stamp on it was not his. The Respondent only acknowledged the box shaped-stamp in the Invoice dated 9th July 2020 (C-Exhibit 1 at page 14 of the record of appeal). Document number 2 in the Appellant's list of documents being Delivery Note dated 18th November 2023 was never produced and that questions on it were expunged. The Respondent therefore submits that the trial magistrate did not err in its finding.

20. It was further submitted that the Appellant's suggestion that the Honourable court erred in law by failing to appreciate that the claim did not arise from a single supply of goods by the Appellant to the Respondent but a number of supplies which the Respondent failed to fully settle should not be accepted in view of the fact that it had framed its case for the specific claim for Kshs 113, 780/ allegedly incurred in July 2020 and not any other date. The Respondent submits that indeed he had a business relationship with the Appellant where the Appellant brought him goods and that he paid for them. That the claim presented

before court was for specific delivery which was not paid amounting to Kshs.113,780 arising from supply of cement valued at Kshs.113,780 on 1st July 2020 as has been submitted. That the claim was not for unsettled balances. If anything, it has been submitted hereinabove that, factoring in the Credit Note amount Kshs.396,00 reintroduced in the cash statement (C-Exhibit 2), it is the Appellant who owes the Respondent Kshs.282,220 as overpayment.

21. The Appellant argued that the Honourable Court erred in law by failing to appreciate that under law of contract, agreements may be oral or partly oral and partly written and by disregarding the Appellant's uncontroverted evidence of multiple supplies which formed the basis of the claim. The Respondent submits that there was nothing on record, oral or written, showing that the appellant and the respondent entered into an agreement on 1st July 2020 as per paragraph 4(4) of the statement of claim or that cement worth Kshs.113,780 was supplied to the Respondent on 1st July 2020 as per paragraphs 3, 4(5) and 4(6) of the Claimant's Statement of Claim. The Respondent categorically denied these claims and that the trial court found no proof of the same.

22. As regards the Appellant's claim that the parties had a business relationship, the Respondent submits that it is was not in dispute that there existed a business relationship between

the parties but what the Respondent denied was entering into an agreement with the Appellant on 1st July 2020 and being supplied with cement worth Kshs.113,780 on 1st July 2020 as pleaded by the Appellant. Had there been supply of cement worth Kshs.113,780, such an invoice would have been the first entry in the cash statement (C-Exhibit 2). It was submitted that the Respondent stated that for all supplies delivered to him, he paid in full. That at one point he was given a credit note of Kshs.396,000 for substandard goods which he was supplied with and he returned. That he continued to send money to the Appellant as he could still order goods but unfortunately the relationship ended.

23. The Respondent submits that the purpose of producing the statement (R-Exhibit 2) was to demonstrate that no cement was supplied on 1st July 2020 worth Kshs.113,780 as was alleged since the statement would have shown such an invoice being that it was prepared by the Appellant. Secondly, it was to demonstrate that he had been given credit note worth Kshs.396,000 for returning substandard goods and show that the Appellant went ahead to re-introduce the credit note despite taking the substandard goods thus creating a notion of a balance of Kshs.113,600 when in reality there was an overpayment of Kshs.282,220. In the statement, the credit note is captured on 28th July 2020 as credited then again debited. That this is a case where the Appellant alleged that it supplied

the Claimant with cement valued at Kshs.113,780 on 1st July 2020. It neither produced delivery note or invoice or agreement of 1st July 2020 as per its pleadings. That the sudden claim that the Kshs.113,780 was a balance on previous supplies is a departure from pleadings wherein the Appellant stated clearly that its claim is for Kshs.113,780 being unpaid sum for cement supplied on 1st July 2020. Parties must be bound by their pleadings. The Respondent respectfully and humbly urges this court to uphold the trial court's judgment with costs to the Respondent.

24. I have considered the record of appeal, submissions on record and all the relevant authorities relied on by the parties. I find the issue for determination is whether the Appellant's case was proved on a balance of probabilities.

25. **Section 107 of the Evidence Act Cap 80 Laws of Kenya** stipulates thus:

107. Burden of proof. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

26. Indeed, the old adage still holds namely that “whosoever alleges must prove”. In the case of **Raila Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others; Aukot & Another (Interested Parties); Attorney General & Another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017)** (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ) , the Supreme Court stated as doth:

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"The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. The Black's Law Dictionary defines the concept as [a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production. With that definition, the next issue is: who has the burden of proof ..."

It is the obligation on a party to convince the court on a fact namely, to persuade a court to come into one's way of thinking. The persuasion would be to get the court to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue and one that will be critical to the

party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail and that they will not get whatever judgment they require and that if it is the prosecution, then they will not sustain a conviction and that if it is a plaintiff the claim or relief will not be granted. Thus there will be a burden to persuade the court on each fact as it is the obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

27. In the instant case, it behooved upon the Appellant to adduce evidence that proves its claim. The Appellant has alleged in its claim that there was an agreement between himself and the Respondent regarding supply of cement on 1st July 2020 for the sum of Kshs 113, 780/= . It produced Exhibit 4 (an alleged commitment letter of acknowledgement of a debt) which the Respondent denied ever seeing it let alone being party to it nor signing it. On cross examination of the Appellant's witness, he stated that he did not have any delivery notes or invoices to evidence the goods supplied on 1st July 2020.

28. On his part, the Respondent stated that indeed he had done business with the Appellant for a long time but that he had

paid for all the goods purchased. It was his testimony that he would pay for the goods before they were brought, and that he has no debts owing to the Appellant.

29. In the case of **William Muthee Muthami v Bank of Baroda [2014] eKLR**, this court observed:

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

30. In **Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Another [2014] eKLR**, this Court observed:

“It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration”.

31. Also, the learned authors, **Cheshire, Fifoot and Formstons, the Law of Contract, (14th Edition) at pages 34 and 35**, have authored that:

“The first task of the plaintiff is to prove the presence of a definite offer made...Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer”.

32. From the record, it is noted that it is not in contention that the parties herein had carried on business together for some time. In **Abdulkadir Shariff Abdirahim & Another v Awo Shariff Mohammed T/A A.S. Mohammed Investments [2014] eKLR**, this Court stated:

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the Law of Contract Act is one such provision”.

33. Lord Clarke put it thus in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14**:

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend

agreement of such terms to be a precondition to a concluded and legally binding agreement”.

34. The brief history of the dispute herein was inter alia; that the Claimant’s suit in the trial court was that on or about 1st July 2020 it entered into an agreement with the Respondent for the supply of cement; that pursuant to the agreement, the Respondent acknowledged receipt of and confirmed it received the cement as ordered for a quoted sum of Kshs. 113,780/=; that the Claimant thus claimed payment of Kshs.113,780 for goods (cement) allegedly supplied to the Respondent on or about 1st July 2020. The Respondent denied the claim and stated that whereas he used to buy cement from the Claimant, they did not enter into any supply agreement as alleged. That he paid for all the purchases he made from the Claimant and that he does not owe the Claimant any debt. Upon considering pleadings, evidence and submissions by the parties, the court dismissed the Claimant’s case. The court held that the Claimant failed to prove its case on a balance of probabilities for failing to produce the agreement for supply of cement and proof of delivery of cement valued at Kshs.113, 780.

35. I have perused the Appellant’s grounds of appeal and note that the Appellant’s main plank in this appeal is that the parties had a long business relationship wherein the Appellant supplied cement to the Respondent for a long period and that several payments were made by the Respondent for goods supplied but

that there was an outstanding debt of Kshs 113, 780/= which was incurred as on 1st July 2020. It is further the Appellant's contention that the trial court ought to have considered the conduct of the parties and proceed to find that there was both oral and written agreement between the parties and now urges this court to find that an oral contract supported by invoices and account statements is enforceable.

36. The Appellant has taken great exception at the trial court's finding in dismissing its legitimate claim and that as far as the Appellant is concerned, the Respondent was duly supplied with the goods and ought to pay therefor based on their business relationship. Indeed, the trial court considered that both parties admitted having a business relationship and that the Respondent agreed that the Claimant would supply him with cement and other goods and that he would pay for them. The trial court also considered the Respondent's defense and testimony that he never entered into any agreement for supply of cement or that he owed the Claimant Kshs.113,780 for supply of cement. The the trial court noted that no agreement was produced showing contract for delivery of cement valued at Kshs.113,780. That the court noted that the Claimant only produced a statement of account and commitment letter which were produced as C-Exhibit 2 and C-Exhibit 3 respectively per document Nos. 3 and 4 in claimant's list of documents at page 12 of the Record of Appeal. The court noted that the Respondent refuted ever signing the commitment letter and the

Claimant never called any witness who oversaw execution of the letter. It was then held that a mere production of statement of account was not sufficient to enlighten the court on debts due and owing for goods supplied in the absence of the agreement and or delivery note showing supply. That the court found that the Claimant fell short of the burden placed on it by Section 107 of the Evidence Act which requires that whoever alleges must prove. Indeed, a perusal of the Appellant's claim as pleaded shows that it had claimed a sum of Kshs 113, 780 being in respect of cement supplied to the Respondent on 1st July 2020 as seen vide paragraph 3 of the Claimant's statement of claim thus **"Goods sold and delivered on or about the 1st day of July 2020 to the value of Kshs 113,780"**. Moving to paragraph 4(4) the Appellant pleaded that **"On or about the 1st July 2020, the respondent herein entered into an agreement with the claimant for the supply of cement under which the claimant was to supply cement to the respondent"**. Finally, at paragraphs 4(5) and 4(6) it was pleaded that **"The respondent acknowledged receipt of and confirmed it received the cement as ordered for a quoted sum of Kshs.113,780/=..."** and **"Despite the Claimant's numerous remainders to the Respondent to pay for the goods delivered in the sum of Kshs. 113,780/=," respectively**. It is noted that the above pleadings are replicated in the Appellant's adopted witness' statement at page 10 of the record of appeal. This then shows

that the Appellant's claim concerned goods sold and delivered on 1st July 2020 to the value of Kshs.113,780 and which was supported by an agreement entered into on 1st July 2020 for the supply of cement amounting to Kshs.113,780 which the Respondent received.

37.

38. Going through the evidence of the Appellant's witness, it is clear that the witness neither produced the agreement dated 1st July 2020 for the supply of cement worth Kshs.113,780 nor delivery note or invoice for cement delivered worth Kshs.113,780 and that what was produced was the cash statement (C-Exhibit 2) which does not include any invoice dated 1st July 2020 for Kshs.113,780 and that the handwritten commitment letter dated 9th October 2020 (C-Exhibit 3) for Kshs.243,780 was denied by the Respondent as it is completely unrelated to the pleaded claim of cement delivered on 1st July 2020 worth Kshs.113,780. During cross-examination, the said Appellant's witness admitted that he did not file the agreement and delivery note or invoice for the supply worth Kshs.113,780 as pleaded. He also admitted that he was not present when the commitment letter was signed as there was a representative to oversee the same but who was however not called to shed light on the document in view of the fact the Respondent vehemently denied the same. The Appellant's witness defended the document and argued that the Kshs.113,780 was a balance as per the last entry dated 21st February 2022. However, the same

was never pleaded in the claim since what was pleaded was not 'a balance' but a specific supply made on 1st July 2020 amounting to Kshs.113,780 pursuant to an agreement entered into on the same date and that no record specific to 1st July 2020 was produced by the Appellant. The Appellant attempted to go round the issue by claiming that the business relationship had been ongoing for a long time and thus the payment outstanding was actually some balances that remained but it failed to explain why the evidence was a departure from the pleadings in support of the claim.

39. The Respondent on his part gave an explanation to the effect that the issue of alleged balance of Kshs.113,780 captured in C-Exhibit 2 during trial was as a result of double entry whereby the Claimant gave the Respondent a credit note for Kshs.396,000 on 28th July 2020 on account of goods that were delivered in bad condition which the Claimant got back but went ahead to re-enter the Kshs.396,000 in the cash statement. The Respondent explained that due to that double entry he overpaid the Claimant by Kshs.282,220 thus it is the Claimant who owes him and not him owing the Claimant. In this case, the Appellant's pleadings, are that it supplied cement worth Kshs.113,780 on 1st July 2020 pursuant to an agreement on 1st July 2020 to supply cement for Kshs.113,780; and not that he supplied goods worth much more and the Respondent paid partly while remaining with a balance of Kshs.113,780. It is noted that the agreement was never produced and that the delivery note or

invoice for cement worth Kshs.113,780 as pleaded were also not produced. This then seems to create the impression that the Respondent's explanation regarding the matter was more believable than the version by the Appellant. Hence, it is clear that the Appellant did not manage to establish its claim on a balance of probabilities and that the trial court's finding was quite sound and ought to be upheld.

40. The Appellant has also faulted the trial court for not allowing the claim yet the Respondent signed the handwritten commitment letter. A perusal of the proceedings shows that the Respondent during his examination-in-chief that he categorically stated that he had never seen the commitment letter before and stated that the stamp on it was not his. During cross-examination, he maintained that he never signed the commitment letter (C-Exhibit 3) and that the stamp on it was not his. The Respondent only acknowledged the box shaped-stamp in the Invoice dated 9th July 2020 (C-Exhibit 1 at page 14 of the record of appeal). Document number 2 in the Appellant's list of documents being Delivery Note dated 18th November 2023 was never produced and that questions on it were raised and which the trial court upheld the objection in which the document was expunged. Hence, the document regarding the Respondent's commitment became doubtful. Even though the Appellant wished the court to consider the parties previous business relationship, the manner in which the Appellant drafted its claim and restricted the debt of Kshs 113, 780/= to 1st July

2020 and pleaded that there was an agreement and documents in support thereof thus weakened its case as it was bound by its pleadings and further, there is no evidence to the effect that the Appellant sought to amend its pleadings. Further, the Respondent's claim that the Appellant owed him some monies after his reconciliation of the accounts which he termed as excess payment and thus the need for a refund lacks any basis as he did not put in a counterclaim vide his defence. On the whole, I find that the Appellant's attempt to seek refuge on the parties previous business relationship to support the claim has been blown by its own manner of presenting its claim by pleading that there was a debt owed in the sum of Kshs 113,780/= which was incurred on 1st July 2020 and which was backed by an agreement and invoices thereto yet none were produced to support the same. The Appellant was bound by its own pleadings and thus could not depart from the same unless through amendment of those pleadings.

41. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

Dated and delivered at Siaya this 14th day November 2025.

D. KEMEI

JUDGE

In the presence of:

M/s Ngumbao for Ataka.....for Appellant

N/A Ochiengfor Respondent

Maureen.....Court Assistant